Arab-Malaysian Securities Sdn Bhd v Chan Mon Hoi @ Yeo Mon Hoi

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–3287 OF 1998
VINCENT NG J
30 APRIL 2003

Civil Procedure *— Stay of execution pending appeal — Appeal against summary judgment — Ingredients necessary to warrant the exercise of the court's discretion in favor of a stay*

Civil Procedure *— Stay of execution pending appeal — Appeal against summary judgment — Application focused entirely on premise that applicant's appeal had merits — No other special circumstances shown — Whether application for stay ought to be allowed*

In this case, after an almost 15-month delay, the defendant applied to stay execution of the plaintiff's summary judgment, pending her appeal to the Court of Appeal. The senior assistant registrar dismissed her application and she appealed.

Held, dismissing the appeal with costs:

(1) Although the court has an unfettered discretion to grant a stay of execution, this discretion should only be exercised where there exists special circumstances. The three essential ingredients necessary to warrant the exercise of the court's discretion in favor of a stay are: (i) where the balance of convenience is in favor of the applicant; (ii) where it is apparent that unless a stay is granted an appeal would be rendered nugatory; and (iii) the applicant has an arguable case (see p 482E–G).

(2) In the instant case, although the defendant's application was grounded on 'special and exceptional circumstances', it was focused entirely on the single premise that the defendant's appeal had merits. The defendant's supporting affidavits lacked reference to any other special circumstances (see pp 482I–483A, C).

[Bahasa Malaysia summary

Dalam kes ini, setelah berlaku kelewatan lebih kurang 15 bulan, defendan telah memohon untuk menggantung perlaksanaan penghakiman terus plaintif, sementara menunggu rayuan beliau di Mahkamah Rayuan. Penolong kanan pendaftar telah menolak permohonan beliau dan beliau telah merayu.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun mahkamah mempunyai budi bicara yang bebas untuk membenarkan satu penggantungan perlaksanaan, budi bicara ini sepatutnya hanya digunakan si mana terdapat keadaan-keadaan

istimewa. Tiga kandungan yang penting yang diperlukan untuk mewarankan penggunaan budi bicara mahkamah untuk mendapat penggantungan adalah: (i) di mana imbangan kemudahan menyebelahi pemohon; (ii) di mana ia adalah jelas jika satu penggantungan dibenarkan satu rayuan akan menjadi tidak berguna; dan (iii) pemohon mempunyai satu kes yang boleh dihujahkan (lihat ms 482E–G).

(2) Dalam kes semasa, walaupun permohonan defendan berasaskan 'special and exceptional circumstances', ia memfokuskan keseluruhannya atas satu premis sahaja iaitu rayuan defendan mempunyai merit. Afidavit-afidavit sokongan defendan kurang rujukan kepada mana-mana keadaan istimewa yang lain (lihat ms 482I–483A, C).]

Notes

For cases on appeal against summary judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 5499.

Cases referred to

A-G v Emerson & Co [1889] 24 QBD 56 (refd)
Alexander v Cambridge Credit Corp Ltd [1985] 10 ACLR 42 (refd)
Andrews & Anor v John Fairfax & Sons Ltd (1979) 2 NSWLR 184 (refd)
Clyne v Deputy Commissioner of Taxation [1982] 56 ALJR 857 (refd)
Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)
Mohamed Mustafa v Kandasami (No 2) [1979] 2 MLJ 126 (refd)
Scarborough v Law's Junction Stores Pty Ltd (1993) VR 129 (refd)
Seow Teow Guan & Ors v Kian Joa Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 (refd)
Wilson v Church (No 2) [1879] 12 Ch D 454 (refd)

R Kengadharan (*R Kengadharan & Co*) for the appellant/defendant.
Sanjay Mohan (*Le hishammuddin*) for the respondent/plaintiff.

Vincent Ng J:

Preamble

Before me is the defendant's appeal (encl 39) against the decision of the learned senior assistant registrar on 18 October 2002, dismissing the defendant's application dated 8 February 2002, to stay execution of the summary judgment dated 13 November 2000, pending the defendant's appeal to the Court of Appeal.

Background facts

In the statement of claim dated 10 September 1998, the plaintiff sought the following:

(i) contra losses amounting to RM722,832,37;

(ii) interests an the principal sum of RM700, 614,95 at the rate of 15% pa from 14 March 1998 till date of full settlement; and

(iii) costs.

The plaintiff then applied for summary judgment (Encl 4) which was dismissed by the learned deputy registrar on 15 December 1999.

When the plaintiff's appeal against that decision came before Yang Arif Mohd Ghazali J on 13 November 2000, he allowed part of the plaintiff's claim in respect of the principal sum of RM691,350.61 and ordered that the plaintiff's claim for interest and services charges be tried.

The dissatisfied defendant filed a notice of appeal to the Court of Appeal in respect of that decision on 8 December 2000.

A perusal of the cause papers showed that the plaintiff proceeded diligently to take the necessary steps to set down the matter for full trial.

The appeal

After an unexplained lapse of a few days short of 15 months, the defendant took out the application to stay execution of the said summary judgment pending her appeal to the Court of Appeal (encl 32).

Although it is trite law that the court has an unfettered discretion to grant a stay of execution, this discretion should only be exercised when there exists special circumstances.

I have consistently maintained that the three essential ingredients that are necessary to warrant the exercise of my discretion in favor of a stay are:

(i) where 'the balance of convenience' is in favor of the applicant;

(ii) where 'it is apparent that unless a stay is granted, an appeal will be rendered nugatory...'; and

(iii) the applicant 'has an arguable' appeal.

(See *Wilson v Church (No 2)* [1879] 12 Ch D 454, *A-G v Emerson & Co* [1889] 24 QBD 56, *Andrews & Anor v John Fairfax & Sons Ltd* (1979) 2 NSWLR 184, *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126, *Scarborough v Law's Junction Stores Pty Ltd* (1993) VR 129, *Clyne v Deputy Commissioner of Taxation* [1982] 56 ALJR 857, *Alexander v Cambridge Credit Corp Ltd* [1985] 10 ACLR 42, *Seow Teow Guan & Ors v Kian Joa Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299, *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493 and *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49.)

In the present case, although the defendant averred that the application was grounded on 'special and exceptional circumstances', I found it to be

A focused entirely on the single premise that the defendant's appeal has merits.

In furtherance of this premise, the defendant set out the issues, which he asserted that the judge had erroneously dismissed as not being triable, and issues that he failed to consider during the hearing of the appeal. The
B defendant also alluded to new documents, which were neither adduced before the learned deputy registrar nor my brother judge, for consideration, at the summary judgment stage.

The defendant's three affidavits, filed in support of the stay application, are starkly lacking in reference to any other special circumstances, especially the nugatory ingredient against the plaintiff, an established securities
C institution whose credit worthiness was not impugned by the defendant.

Conclusion

Having observed that the circumstances in the instant case would not suffice to tilt the balance in favor of a stay, I have no difficulty in dismissing
D the defendant's appeal in encl 39 with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon

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